STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal From The Michigan Court of Appeals
Honorable Jane E. Markey, Presiding

RICHARD R. ROBERTS and
STACEY D. ROBERTS,

Plaintiffs-Appellants,

v

ROBERT L. SAFFELL and
JOANNE O. SAFFELL,

Defendants-Appellees.

Supreme Court Docket No. 137749

Court of Appeals Docket No. 275458

Leelanau Circuit Court: 05-007063-CK

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QUESTIONS PRESENTED FOR REVIEW

On April 8, 2009, this Court ordered oral argument and permitted supplemental briefing on what action the Court should take on Plaintiffs-Appellants' Application for Leave to Appeal, and concerning four particular issues. See, Michigan Supreme Court Order, Case No. 137749, April 8, 2009, a copy of which is attached as Exhibit 1. However, Amicus Curiae the Michigan Association of REALTORS® is only concerned with the first issue of law:

I. **DID THE COURT OF APPEALS ERR BY HOLDING THAT INNOCENT MISREPRESENTATION IS NOT A VIABLE THEORY OF LIABILITY UNDER THE SELLER DISCLOSURE ACT, MCL 565.951, *et seq*?**

The Court of Appeals would answer "No."

The Circuit Court would not have answered this question.

Plaintiffs-Appellants would answer "Yes."

Defendants-Appellees answer "No."

Amicus Curiae the Michigan Association of REALTORS® answers "No."

I. INTRODUCTION AND STATEMENT OF INTEREST

Amicus Curiae the Michigan Association of REALTORS® (the "Association") is Michigan's leading organization of real estate professionals and largest non-profit trade association, comprising over 40 local boards and a membership of more than 24,000 brokers and salespersons licensed under Michigan law. Each day, the Association's members are involved in hundreds of real estate transactions. Because real estate sales, and particularly single-family home sales and ownership historically have been key segments of Michigan's economy, the Association has consistently advocated public policy and legal outcomes that foster predictability and reasonableness in transactions that touch and concern the value of home ownership.

This case is of vital concern to the Association, its members, and the home buyers and sellers that employ them, because it involves an important issue previously settled by the Court of Appeals, and indeed by the plain language of the applicable statute – that is, the Michigan Seller Disclosure Act (the "SDA"), MCL 565.951, *et seq*. The Court of Appeals in this case correctly held that an innocent misrepresentation claim based upon statements contained in a seller's disclosure statement is *not* viable.

The members of the Association have a unique interest in this case, simply by reason of fact that the Legislature charged the members of the Association with the primary administration of the SDA. Real estate licensees are charged with making the seller's disclosure form available to the public. MCL 565.958. Further, real estate licensees, as "transferor's agents" or "transferee's agents," are primarily responsible for making sure that after a seller fills out a seller's disclosure statement, the completed statement ends up in the hands of the

prospective buyer before the parties enter into a binding purchase agreement. MCL 565.954. As will be discussed below, the Association was involved in the drafting and strongly supported the passage of the SDA. At the time the SDA was enacted, the reporting requirements were seen as an effective means of creating a uniform system of communication between the sellers and buyers, specifically aimed at eliminating misunderstandings that historically had often resulted in litigation. The Association and its members have carried out their duties under the SDA since January 8, 1994, with the belief that the use of the seller's disclosure form required by the SDA has in fact made for better-informed buyers and has caused a significant decrease in misunderstandings and litigation resulting from those misunderstandings. The benefits from the SDA to the selling and buying public will not be advanced if the SDA turns into a "trap" for sellers who, acting in good faith, innocently make a mistake when filling out the seller's disclosure statement.

In *Grand Rapids v Consumers Power Company*, 216 Mich 409, 41 5; 185 NW 852 (1921), this Court stated: "This Court is always desirous of having all the light it may have on the questions before it. In cases involving questions of important public interest, leave is generally granted to file a brief amicus curiae . . . ." Liability under the SDA is an issue of fundamental importance to the Association, its some 24,000 members, and their clients. This Court has ordered oral argument and permitted additional briefing on Plaintiffs-Appellants' Application for Leave (the "Application"), and a revisiting of the Court of Appeals' decision would have major significance for the state's jurisprudence. The Association does not necessarily support the position of either party in this appeal; rather, the Association's

experience and expertise could be beneficial to this Court in determining what action to take on the Application. Accordingly, the Association files this Brief Amicus Curiae.

II. STATEMENT OF FACTS

The specific facts of this case are not relevant for purposes of the issue of law that the Association seeks to address in this appeal.

III. ARGUMENT

A. A Note On The Question Presented

As a matter of clarification, the issue addressed by the Court of Appeals was not whether innocent misrepresentation was a viable theory under the SDA. There are no separate causes of action under the SDA; rather, a buyer must look to traditional common law theories of recovery.

Under the SDA, if a seller fails to provide the buyer with an accurate, complete seller's disclosure statement, the buyer has the right to terminate the purchase agreement at any time up until the actual closing. MCL 565.954(3). The SDA contains no other remedies. By the SDA's plain terms, any remedy available under it is extinguished at closing. As stated by the Michigan Court of Appeals in *Pena v Ellis*, unpublished decision per curiam, issued April 18, 2006 (Docket No. 257840), 2006 WL 1006444, *2 (attached as Exhibit 2):

> Because the SDA contemplates that liability may attach for violation of its provisions, MCL 565.955-.956, .964, but fails to provide a statutory mechanism for pursuit of such claims, MCL 565.954-.966, while explicitly acknowledging existing common law mechanisms, MCL 565.961, we conclude that the Legislature intended common law causes of action in fraud to operate as the SDA enforcement mechanisms.

See also, Vettese v Zehr, unpublished opinion per curiam of the Court of Appeals, issued December 15, 2005 (Docket No. 255919), 2005 WL 3439788 (attached as Exhibit 3); and *Timmons v DeVoll*, unpublished opinion per curiam of the Court of Appeals, issued February 24, 2004 (Docket No. 241507), 2004 WL 345495 (attached as Exhibit 4).

With all due respect, the Association submits that this issue is more appropriately framed as follows:

> Did the Court of Appeals err by holding that a seller cannot be liable for an innocent misrepresentation made in a seller's disclosure statement provided in accordance with the Seller's Disclosure Act, MCL 565.951, *et seq?*

B. Standard Of Review

The Court of Appeals' holding that there is no claim for innocent misrepresentation based upon statements made pursuant to the SDA, is a matter of law reviewable de novo. *Lapeer Co Clerk v Lapeer Circuit Judges*, 465 Mich 559, 566; 640 NW2d 567 (2002) (statute interpretation is reviewed de novo); *Forge v Smith,* 458 Mich 198, 204; 580 NW2d 876 (1998) (de novo review for issues of law generally).

C. No Common Law Claim For Innocent Misrepresentation Exists For Statements Made In Seller's Disclosure Statement

It has traditionally been the law in Michigan that a seller can be liable for even an innocent misrepresentation. An innocent misrepresentation claim has the same elements as a fraud claim except that the plaintiff need not prove that the defendant knew or should have known that the statement was false. *M&D, Inc v McConkey*, 231 Mich App 22; 585 NW2d 33 (1998). As with an active fraud claim, however, with an innocent misrepresentation claim, a

plaintiff must prove that the defendant made the representation with the intention that it should be acted upon and that the plaintiff acted in justifiable and reasonable reliance upon that representation.

Prior to this case, there was a reported decision of the Michigan Court of Appeals in which the Court held that in order for a seller to be liable for a false statement in a seller's disclosure statement, a plaintiff must be able to show that the seller either knew the statement was false or should have known that the statement was false. *Bergen v Baker*, 264 Mich App 376; 692 NW 2d 770 (2004). That case involved a significant leaking problem in the roof of a glass-paned sunroom. While the buyer admitted that the seller's disclosure statement had indicated that there were roof leaks, the buyer argued that the sellers should be liable because they failed to disclose the extent of the problem. The trial court had dismissed the case in favor of the sellers, and the buyers appealed. In discussing the seller's potential liability for fraudulent statements in the seller's disclosure statement, the Court of Appeals first quoted from Section 5 of the SDA, MCL 565.955:

> The transferor . . . is not liable for any error, inaccuracy, or omission in any information delivered pursuant to [the SDA] if the error, inaccuracy, or omission was not within the personal knowledge of the transferor, or was based entirely on information provided by public agencies or [certain experts explicitly named in the SDA] . . . and ordinary care was exercised in transmitting the information.

The Court of Appeals found that such language was clear and unambiguous such that it could only assume that the Legislature meant what it said:

> Reviewing collectively the language of the relevant statutes that comprise the SDA, it is evident that the Legislature intended to

> allow for seller liability in a civil action alleging fraud or violation of the act brought by a purchaser on the basis of misrepresentations or omissions in a disclosure statement, but with some limitations. **Liability is precluded for errors, inaccuracies, or omissions in a seller disclosure statement that existed when the statement was delivered, where the seller lacked personal knowledge and would not have had personal knowledge by the exercise of ordinary care** . . . and thus proceeds in good faith to deliver the disclosure statement to the buyer.

Bergen, supra at 385 (emphasis added).[1]

Under the reasoning in *Bergen*, there can be no claim for an innocent misrepresentation based upon statements made in a seller's disclosure statement provided pursuant to the SDA. In fact, prior to the present case, the Court of Appeals had expressly rejected such claims under the SDA in a number of unreported decisions. For example, in *Paule v Iwaniw,* unpublished opinion per curiam of the Court of Appeals, issued October 5, 2001 (Docket No. 225590), 2001 WL 1179682 (attached as Exhibit 5), the plaintiff home buyer filed suit against the seller alleging a number of different causes of action, including innocent misrepresentation based on statements made in a seller's disclosure statement. On appeal after the trial court granted the seller's motion for summary disposition, the Court of Appeals stated:

> Moreover, although the parties and the trial court did not address the issue, we hold that MCL §565.955(1) eliminated any claim based on innocent misrepresentation in the context of a claim

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[1] In its decision below, the Court of Appeals took issue with the *Bergen* Court's apparent recognition of a claim for negligent misrepresentation based upon statements in a seller's disclosure statement. In its decision, the Court of Appeals stated that "[a]lthough we do not address such a claim because it was not pleaded here, we disagree with the *Bergen* Court that the SDA imposes a duty on a seller to exercise ordinary care to discover defects in a home being sold. [*Citations omitted.*] The SDA only imposes a duty on the transferor of real estate covered by the act to honestly disclose items about which the transferor actually knows."

> premised on a misrepresentation contained in a disclosure statement, because personal knowledge or ordinary care is required by the statute. The language indicates a legislative intent to hold vendors liable only for intentional or negligent misrepresentation.

Paule at *3. See *also, Timmons v DeVoll, supra; Beshada v Millard Realty,* unpublished opinion per curiam of the Court of Appeals, issued January 13, 2004 (Docket No. 244635), 2004 WL 60321 (attached as Exhibit 6); and *D'Souza v Zopf,* unpublished memorandum opinion of the Court of Appeals, issued August 21, 2001 (Docket No. 223253), 2001 WL 951748 (attached as Exhibit 7).

In summary, the SDA expressly states that a seller is not liable for errors "not within the personal knowledge" of the seller. Accordingly, the Court of Appeals' determination that a seller cannot be held liable for innocently made false statements is consistent with the plain language of the SDA and should be affirmed.

D. Court Of Appeals' Decision Is Not Only Supported By Plain Language Of SDA And Prior Case Law, But Is Also Good Public Policy

There are a number of good policy reasons behind the Legislature's decision to limit liability for false statements in a seller's disclosure statement to knowingly false statements. Prior to the passage of the SDA, home sellers could avoid liability for innocent misrepresentations simply by remaining silent. With the passage of the SDA, this is no longer possible. Under the SDA, a home seller must complete a seller's disclosure form. The instructions to the seller included in the form require a seller to "Answer ALL questions."

At the time the SDA was enacted, the Association supported the mandatory

uniform system of disclosure as to the conditions of a home for the reasons cited above. At that time, a concern was expressed by some members of the Bar that the benefits from the SDA flowed primarily to buyers, while sellers would run the risk of being held liable for innocent errors made when filling out the seller's disclosure form. Even those commentators acknowledged the potential benefits of the SDA:

> In theory, mandatory disclosures benefit both sellers and buyers (especially inexperienced buyers) by providing reassurance about a home and by minimizing unpleasant surprises that can occur after a buyer takes possession. Ensuring that at least a required minimum amount of information is provided on the home results in better-informed buyers. This, in turn, means fewer disappointed buyers, fewer lawsuits and fewer disrupted sales. Everyone benefits, at least in theory. [Footnotes omitted.]

Nathanson, Gregg A. *Michigan's New Seller Disclosure Act: Seller Beware*, Vol 21, No 2, *Mich Real Property Review* 71, 72 (Summer, 1994) (attached as Exhibit 8). The concern that buyers would benefit at the expense of sellers was recognized by the drafters and every effort was made to make certain the benefits of the SDA inured to both sellers and buyers. The SDA was drafted to provide for better-informed buyers without unfairly subjecting sellers to liability for innocent mistakes. The protection from liability for innocent misrepresentations was the bedrock for making certain that sellers could and would voluntarily and enthusiastically comply with the requirements of the SDA.

It would be inherently inequitable to require a seller to answer ALL questions in the seller's disclosure statement and then hold the seller responsible if he or she is innocently mistaken. This is particularly true when the same form advises both the seller who provides the form and the buyer who receives the form that:

> **Purpose of Statement:** This statement is a disclosure of the condition of the property in compliance with the seller disclosure act. This statement is a disclosure of the condition and information concerning the property, known by the seller. Unless otherwise advised, the seller does not possess any expertise in construction, architecture, engineering, or any other specific area related to the construction or condition of the improvements on the property or the land. Also, unless otherwise advised, the seller has not conducted any inspection of generally inaccessible areas such as the foundation or roof. This statement is not a warranty of any kind by the seller or by any agent representing the seller in this transaction, and is not a substitute for any inspections or warranties the buyer may wish to obtain.
>
> * * *
>
> BUYER SHOULD OBTAIN PROFESSIONAL ADVICE AND INSPECTIONS OF THE PROPERTY TO MORE FULLY DETERMINE THE CONDITION OF THE PROPERTY.

If for no other reason, a claim for innocent misrepresentation based upon a statement in a seller's disclosure statement should fail because the element of justifiable and reasonable reliance cannot be established. Recipients of these forms are expressly advised that the statements in the forms are NOT warranties, but simply based upon the seller's actual knowledge, and that accordingly, the buyer should do its own thorough inspection of the property. While it is reasonable for a buyer to rely on the fact that the seller was being truthful in his or her answers, a buyer has no reasonable basis for believing that the condition of the property is guaranteed as represented.

If sellers are to be held liable for false statements innocently made in seller's disclosure statements, then future sellers knowledgeable in the law will simply answer "unknown" to all of the questions asked, thereby providing the buyer with no information

whatsoever. Only uninformed sellers – presumably relying on the qualifying language in the form itself – will answer the questions presented to the best of their knowledge. Alternatively, informed sellers may simply choose not to comply with the SDA. If a seller does not provide a seller's disclosure form, a prospective buyer can walk away from the transaction without liability up through the date of closing. This risk (*i.e.*, the risk of a buyer walking away) may be deemed by informed sellers to be outweighed by the potential risk of liability for innocent misrepresentations. This obviously would be an unjust result and would defeat the very purpose of the SDA itself.

IV. CONCLUSION AND RELIEF REQUESTED

For all the within stated reasons, the Association respectfully requests that this Honorable Court grant leave to file, and consider, this Brief Amicus Curiae in determining what action to take on the Application.

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